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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TRAYTON LANDROCHE, Defendant and Appellant.	D052061 (Super. Ct. No. SCD201230)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown and David M. Gill, Judges. Affirmed.

Defendant Trayton Landroche filed a motion for discovery of police officer records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), and the court granted an in camera review of such records. The trial court[1] did not find any discoverable records in the materials presented by the custodian of records for the police agency.

1 The Honorable David M. Gill.

In a bifurcated proceeding, a jury convicted Landroche of willfully and unlawfully inflicting corporal injury on a cohabitant in violation of Penal Code[2] section 273.5, subdivision (a) (hereafter section 273.5(a)), and found not true an allegation that he had personally used a deadly weapon in committing the crime (§ 1192.7, subd. (c)(23)). After the jury was excused, Landroche admitted allegations that he had a prior serious felony conviction that qualified as a strike (§§ 667, subd. (b)-(i), 1170.12, 668) and had served a prior prison term (§§ 667.5, subd. (b), 668). The court[3] struck the prison prior allegation and sentenced Landroche to the middle term of three years, doubled that term under the Three Strikes law, and imposed a total prison term of six years.

Landroche appeals, contending: (1) His conviction should be reversed because the court erred in admitting evidence of his prior acts of domestic violence after the prosecutor failed to comply with the 30-day notice requirement of Evidence Code section 1109; (2) the judgment of guilt should be reversed because (a) the court erroneously admitted evidence to prove Landroche's propensity to commit the charged offense in violation of Evidence Code section 352 and his federal constitutional rights to due process and equal protection, and (b) the court gave a propensity instruction to the jury in violation of his rights to due process and equal protection of the law; (3) the judgment of guilt must be reversed because the court violated his right to due process of law and his Sixth Amendment right to a jury trial by failing to give a unanimity instruction; (4) this

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2 All further statutory references are to the Penal Code unless otherwise specified.

3 The Honorable Frank A. Brown.

court should independently review the trial court's in-camera ruling on his *Pitchess* motion and determine whether the judgment should be reversed; and (5) the one-year sentence for the prison prior enhancement should be stricken because the court had no authority to stay the mandatory enhancement.

We have reviewed the sealed police officer records and find no discoverable materials in such records and no error in the trial court's review of the records. We affirm the judgment.

FACTUAL BACKGROUND

A. *The People's Case*

1. *Current offense*

Christina Abel testified that she enlisted in the Navy in November 2005. In May 2006 she began to work in the dermatology clinic at the Balboa Naval Hospital. Landroche worked at Dominic's of New York, a food stand located at Balboa Naval Hospital. He was later transferred to their stand on the Coronado Naval Base. Landroche and Abel began dating a few weeks after they met, and after about two months they began living together in an apartment on Fairmont Avenue.

In August 2006 they were having relationship problems. Landroche became jealous of a friendship Abel had with another man. He began to check on her more often, and he looked through the phone numbers in her cell phone. Abel wanted to end the relationship because of Landroche's jealousy and anger.

On August 24, 2006, Abel did not go home, as she was on duty for 24 hours.

The next morning, Friday, August 25, Abel reported to work at the dermatology clinic. At lunchtime, Landroche showed up at her workplace. Landroche and Abel went out to lunch, and then they drove to their apartment in a car Landroche had borrowed from a friend. Landroche was upset because Abel had received a phone call from a man he did not know, and he accused her of cheating on him. Abel denied it. Landroche pushed Abel down onto the couch and told her to pack up her things and leave. Landroche eventually drove her back to work.

About an hour later, Landroche dropped by Abel's workplace to apologize for what happened during the lunch hour. Later that afternoon, Abel met Landroche at a barbershop downtown, and, as they drove home, he began to yell at her, accusing her of cheating on him. Landroche smacked Abel on the face and head 20 to 30 times, trying to get her to talk. When asked whether it hurt, Abel testified, "[I]t wasn't anything painful that would have left a mark. It was like a little smack[.]"

After they arrived back home, Abel began packing up her belongings. Landroche became angry, began throwing things, took off his belt, bent it in half, and struck Abel with it 10 to 15 times with the leather part. Most of the blows hit her below the waist on her legs. She asked him to stop and told him he was hurting her, but he would not stop. As he straddled over her, Abel grabbed Landroche's testicles and pulled hard, causing him to fall back and stop hitting her. When she tried to leave the bedroom, Landroche blocked the doorway and told her he wanted to talk about preserving their relationship. Abel was scared, told him not to come near her, and got as far away from him as she could. She was not able to call for help because Landroche had her cell phone and

blocked her from entering the living room where the land line phone was located. Believing Landroche would hit her again if she argued with him, Abel said she would stay.

The next morning, August 26, 2006, Landroche left the house to go to a fashion show. After he left, Abel packed up her things and called a friend to pick her up. She had decided to end her relationship with Landroche and report the assault to the police. She stayed with the friend a few hours to calm down and clean up and then called another friend to take her to the police station.

Late that morning, Abel's friend drove her to police headquarters in downtown San Diego to report the assault. The building was closed when they arrived, so she called the number on the door, which connected her to the 911 operator. Abel told the 911 operator that Landroche had hit her with a belt.

Officer Teryl Bernard of the San Diego Police Department interviewed Abel and documented her injuries. Abel had what looked like minor welts, red marks or bruises on her neck, arm and one leg. The injuries were consistent with Abel's description of what had happened.

When Abel arrived on the naval base at Balboa Naval Hospital on Monday, August 28, 2006, Landroche was standing outside the building where she worked, causing her to go inside through a different entrance. Later that day Abel went to the Family Justice Center (FJC) to get a restraining order against Landroche. She told Kristine Rhoades, a military liaison and domestic violence advocate, that Landroche had

beaten her with a belt and showed her the bruises on her leg. Thomas Collins, a registered nurse at the FJC, examined Abel and photographed her injuries.

While Abel was at the FJC, Detective Emmitt Henderson also interviewed her about what had happened. After the interview, Detective Henderson made arrangements with Landroche's parole officer to arrest Landroche when he came to the parole office. The next day, August 29, Detective Henderson arrested Landroche.

While transporting Landroche to the station, Detective Henderson advised him of his rights, and Landroche agreed to talk. Landroche initially denied hitting Abel and complained she was cheating on him. He admitted accessing her cell phone and calling one of the numbers, which he learned belonged to a man, and having an argument with Abel about him. Landroche eventually admitted hitting Abel once with the belt. That same day, Abel returned to the FJC to pick up the restraining order and a copy of the police report.

The next day, August 30, Abel was interviewed by Matthew McClelland, a military police officer. Officer McClelland informed her he had information that she had been using marijuana and stealing steroids and hypodermic needles from the clinic where she worked. After initially denying the accusations, Abel admitted her guilt. Abel had taken the steroids and needles to try to get rid of her acne. Due to her conduct, the Navy later dishonorably discharged her.

2. *Prior acts of domestic violence*

Over defense objection, the court admitted evidence that Landroche committed prior acts of domestic violence against Ashlie Sepke in 2003 and against Sarah Hefty in 2005.

a. *Sepke*

Sepke and Landroche began dating in August 2003. Landroche moved in with Sepke and her mother. After several months, Landroche moved out of the apartment at Sepke's request after he became physical with her following an argument during which Landroche tore off her shirt. However, they continued to date.

In late October 2003 Sepke ended their relationship after another physical altercation. She and Landroche were driving to Oceanside to visit friends when he became angry and hit her in the face, mouth and neck with the back of his hand.

After Sepke ended the relationship, Landroche began to harass her by driving past her apartment and leaving numerous threatening messages on her answering machine. He kicked and broke one of the windows. He also began to follow her, showing up outside of her apartment, at her classes at school, and at her workplace. Landroche continued to threaten and harass Sepke until May 2004.

b. *Hefty*

Hefty testified that she began dating Landroche in October 2004. They started to live together in February 2005 and lived together for about four or five months.

Landroche often called her derogatory names and accused her of being unfaithful. He screened her cell phone calls and insisted that the numbers in her phone belonged to a man she was seeing.

Landroche was abusive and violent at least 10 times. One of those incidents occurred on February 22, 2005, when Landroche did not like her reaction when he made a wrong turn. Landroche cursed at her, poked her near the eye, grabbed the back of her neck, and pushed her head down on or under the dashboard. Hefty reported the assault to the police and obtained a restraining order.

On another occasion, Landroche punched her in the mouth when he caught her looking at his cell phone while she waited for him in the car. On yet another occasion Landroche choked her during an argument. Hefty obtained another restraining order.

During their relationship, Hefty visited Landroche in jail numerous times. He eventually told Hefty he was in jail for stalking Sepke.

B. *The Defense*

Derek Waller testified he was Landroche's supervisor at Dominic's of New York, a sandwich shop that had two locations: one at the Balboa Hospital naval base and one at the naval base in Coronado. Landroche worked at both locations. Landroche began working at the Coronado shop in July 2006. Waller often drove Landroche to work because he did not own a car. Waller would pick Landroche up at his apartment on Fairmont or Landroche would meet Waller behind Balboa Hospital and they would drive to Coronado.

On August 25, 2006, Waller drove Landroche to and from work, dropping him off at his apartment on Fairmont at around 4:00 p.m. At Landroche's request, Waller picked Landroche up again at around 5:00 p.m. and drove him to Encinitas, where he dropped Landroche off at the La Costa Resort at 6:10 p.m and then drove home. They did not make arrangements for Waller to drive Landroche home.

On cross-examination, Waller stated that while he was 90 percent sure Landroche was with him on August 25, 2006, he could have been mistaken and might have mixed up the dates.

Officer McClelland testified that on August 28, 2006, Landroche filed a sworn statement reporting that Abel had stolen steroid vials and hypodermic needles from her workplace and had smoked marijuana. Landroche told Officer McClelland that Abel had been cheating on him. Landroche said that on August 25, after he confronted her, Abel admitted her guilt, and they slept together that night. The next morning, August 26, Landroche kissed her goodbye and went to a fashion show. When Landroche returned home for lunch, Abel and all her belongings were gone.

DISCUSSION

I. *DISCLOSURE UNDER EVIDENCE CODE SECTION 1109*

Landroche first contends his conviction should be reversed because the court[4] erred in admitting evidence of his prior acts of domestic violence after the prosecutor failed to comply with the 30-day notice requirement of Evidence Code section 1109.

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4 The Honorable Frank A. Brown. All further references to the trial court are to Judge Brown unless otherwise specified.

Specifically, Landroche contends (1) the court erred by admitting the testimony of Sepke and Hefty regarding his prior acts of domestic violence because the prosecutor negligently failed to comply with the 30-day notice requirement of [Evidence Code] section 1109, subdivision (b) (hereafter [Evidence Code] section 1109(b)); and (2) the error was prejudicial within the meaning of *People v. Watson* (1956) 46 Cal.2d 818, 836, because (a) the evidence portrayed Landroche as a serial domestic offender, and "the jury may have concluded [he] did not assault [Abel] if the evidence had been excluded"; and (b) "the jury may have found [him] guilty of the lesser offense of simple battery had the evidence not been admitted." Landroche's contentions are unavailing.

A. *Background*

The jury trial in this matter was set for January 2, 2007, and on that date the trial was trailed to the next day.

On January 3, 2007, the new trial date, Landroche filed a motion in limine to exclude evidence of his prior acts of domestic violence on the ground the prosecutor did not disclose the evidence prior to 30 days before the commencement of trial as required by Evidence Code section 1109(b). In his motion papers, Landroche asserted the defense received 45 pages of documentary evidence on December 18, 2006, and another 84 pages a few days later on December 21. The court heard oral arguments on Landroche's in limine motion. The court indicated it thought the prosecutor had acted in good faith, ruled it was going to permit the prosecution to present the Evidence Code section 1109 evidence, and informed Landroche's trial counsel, Matthew Mohun, that the court would entertain a defense request for a continuance of the trial:

> "I'm willing to give you more time. But I'm not going to make evidence go away when the [prosecutor] acted in good faith and complied as far as I can tell. . . . If you want more time because you need to prepare to protect your client, I'm prepared to give you more time."

Following the lunch break, the prosecutor informed the court that the prosecution's computer records indicated that the Evidence Code section 1109 discovery was provided on November 2, 2006, to Landroche's previous counsel, David Lamb of the public defender's office, but the public defender's office returned the discovery on November 6 because Lamb had declared a conflict, and Mohun of the alternative public defender's office had been appointed to represent Landroche. Mohun informed the court that the alternative public defender's office was appointed on October 24, 2006. The court continued both the trial and the hearing on Landroche's in limine motion.

On January 8, 2007, the new trial date, the court again heard oral argument on Landroche's in limine motion. The prosecutor indicated that the public defender's office acknowledged it received the Evidence Code section 1109 discovery on November 2, 2006, and then, unbeknownst to him, returned it on November 6 of that year. The prosecutor also stated that by the time he found out, "it was within the 30 days required to provide discovery," and thus he did not provide the discovery to Mohun until December 18, 2006. The court found the prosecutor's failure to disclose the Evidence Code section 1109 evidence to Mohun with the statutory 30-day period was the result of "a mix-up, through nobody's fault." The following exchange then occurred between Mohun, who made a qualified request for a continuance of the trial, and the court, which granted that request and ruled it would admit the evidence:

"[The Court]: So I'm prepared to go forward with trial, but given the fact that discovery wasn't provided to the defense in a timely fashion as required by statute, is it the defense request to continue this until March 5th for trial?"

"[Mohun]: Yes, it is, Your Honor. But I did want to put on the record that the basic state is that we filed a motion in limine to exclude the [Evidence Code section] 1109 evidence.

"[The Court]: Right.

"[Mohun]: The court reviewed that, reviewed issues presented by the [prosecutor] in that regard. Essentially[, the court] provided the defense an opportunity to continue it, otherwise the evidence would have come in. It chose a least egregious alternative.

"[The Court]: Right. [¶] . . . [¶] I think the [Evidence Code section] 1109 evidence is very, very probative. I think the probative value far outweighs the prejudicial effect. And the statute provides for it because these domestic violence cases are special cases. And so the state legislature has allowed that evidence to come in, and I'm going to permit it."

After Landroche waived his right to a speedy trial, the court continued the trial to March 6, 2007.

At trial, the prosecutor presented the Evidence Code section 1109 evidence, including the stipulated testimony of Sepke and the testimony of Hefty, and the jury found Landroche guilty of inflicting corporal injury on a cohabitant in violation of Penal Code section 273.5(a). Landroche thereafter filed an unsuccessful motion for new trial that was based in part on the court's denial of his in limine motion to exclude the Evidence Code section 1109 evidence.

B. *Applicable Legal Principles*

"Evidence Code section 1109 allows the introduction of evidence of [a] defendant's commission of prior acts of domestic violence in a criminal action charging [the] defendant with an offense involving domestic violence." (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) Specifically, subdivision (a)(1) of Evidence Code section 1109 provides in part (with exceptions not applicable here):

> "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352."

The term "domestic violence" is broadly defined for the purposes of Evidence Code section 1109 as "abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." (Pen. Code, § 13700, subd. (b); Evid. Code, § 1109, subd. (d)(3).) For the same purposes, the term "abuse" is defined as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (Pen. Code, § 13700, subd. (a); see also Evid. Code, § 1109, subd. (d)(3).)

Evidence Code section 1109 creates an exception to the general rule codified in Evidence Code section 1101, subdivision (a) precluding admission of uncharged misconduct to show that the defendant had a propensity to commit crimes. (Evid. Code, § 1109, subd. (a)(1); see also *People v. Johnson* (2000) 77 Cal.App.4th 410, 417.)

The trial court has discretion to exclude evidence of prior acts of domestic violence if the probative value is substantially outweighed by the probability its admission would necessitate undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, §§ 1109, subd. (a)(1), 352, subd. (a).) In assessing whether evidence is unduly prejudicial within the meaning of Evidence Code section 352, the question is whether the evidence "tends to evoke an emotional bias against the defendant with very little effect on issues . . . ." (*People v. Crew* (2003) 31 Cal.4th 822, 842.) In other words, in cases involving the proffering of evidence of prior acts of domestic violence under Evidence Code section 1109, the question is whether there is a likelihood the evidence will inflame the jury so that they will base their verdict not on the evidence presented as to the charged offenses, but rather on an emotional response to the defendant's commission of other acts or crimes.

The admissibility of evidence of domestic violence is subject to the sound discretion of the trial court and the exercise of that discretion will not be disturbed on appeal absent a showing of an abuse of discretion. (*People v. Poplar*, *supra*, 70 Cal.App.4th at p. 1138.)

When the prosecution seeks to present evidence of a defendant's commission of other acts of domestic violence, it is statutorily required to "disclose" that evidence to the defendant in compliance with the provisions of Penal Code section 1054.7. (Evid. Code,

§ 1109(b).)[5] Penal Code section 1054.7 requires that the disclosure of evidence be made "at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred."[6]

The purpose of the disclosure requirement of Evidence Code section 1109(b) is to protect the defendant from unfair surprise and provide adequate time for preparation of a defense. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 980 (*Soto*).)[7]

If the prosecutor does not comply with this disclosure obligation, the trial court may make "any order necessary" to enforce that obligation, including, but not limited to, requiring "immediate disclosure," "delaying or prohibiting the testimony of a witness,"

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5 Evidence Code section 1109(b) provides: "In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the Penal Code."

6 Section 1054.7 provides in part: "The disclosures required under this chapter shall be made *at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred*. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (Italics added.)

7 In *Soto*, the Court of Appeal held that the notice and disclosure requirements of Evidence Code section 1108, subdivision (b) "were designed to 'protect the defendant from unfair surprise and provide adequate time for preparation of a defense.' [Citation.]" (*Soto, supra,* 64 Cal.App.4th at p. 980.) Evidence Code section 1108, subdivision (b), which has a disclosure requirement identical to that of Evidence Code section 1109(b) (see fn. 5, *ante*), provides: "In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code."

"continuance of the matter," "advis[ing] the jury of any failure or refusal to disclose and of any untimely disclosure," or "any other lawful order." (§ 1054.5, subd. (b).)

The trial court, in the exercise of its discretion, may consider a wide range of available discovery sanctions in response to a violation of a discovery obligation, including the option of imposing no sanction, and its ultimate decision is reviewed for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299; *People v. Lamb* (2006) 136 Cal.App.4th 575, 581.)

However, the trial court may prohibit the testimony of a witness under section 1054.5, subdivision (b), "only if all other sanctions have been exhausted." (§ 1054.5, subd. (c); *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1624.)

"[A]bsent a showing of significant prejudice and willful conduct, exclusion of testimony is not appropriate as punishment [because t]o conclude otherwise might well place upon the truth-finding process an imprimatur of unreliability inconsistent with confidence in a finding of guilt." (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758; see also *People v. Jordan* (2003) 108 Cal.App.4th 349, 358 ["exclusion of testimony is not an appropriate remedy absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial"].)

C. *Analysis*

The court acted within its legal discretion when it granted Landroche's request for a continuance of the trial and denied his motion in limine to exclude the Evidence Code section 1109 evidence of his prior acts of domestic violence. It is undisputed that the prosecution failed to disclose that evidence to Landroche's trial counsel, Mohun of the

alternative public defender's office, at least 30 days before the original January 2, 2007 trial date, as required by Penal Code section 1054.7 and Evidence Code section 1109(b). Following a hearing on the matter, the court found the prosecutor's failure to disclose the evidence to Mohun in a timely manner was the result of "a mix-up, through nobody's fault."

The record supports the court's finding. The court's minutes show that Landroche's previous counsel, Lamb of the public defender's office, declared a conflict and was relieved on October 24, 2006, at which time the court appointed Mohun to represent Landroche. Mohun appeared on behalf of Landroche at the readiness conference held on November 1, 2006; and the prosecutor's internal records showed that on that same day he directed his staff to send discovery concerning the prior acts of domestic violence to Mohun. Those records also showed that the prosecutor's staff sent that discovery out the next day, November 2, 2006, 30 days before the January 2, 2007 trial date. Unbeknownst to the prosecutor, the prosecutor's staff sent that discovery to Lamb at the public defender's office, although Lamb was no longer Landroche's attorney of record. The public defender's office sent the discovery back to the prosecutor on November 6, 2006, and by that time the statutory 30-day deadline for disclosing the evidence to Landroche's counsel (Mohun) had passed. When the prosecutor discovered the problem, he immediately sent another set of the materials to Landroche's current counsel, Mohun.

Whether the prosecutor's failure to timely disclose to Landroche (through his trial counsel, Mohun) the evidence of Landroche's prior acts of domestic violence was the

result of negligence or (as the court found) an innocent "mix-up" without fault by the prosecutor's staff, Landroche has not shown, and cannot demonstrate, that the failure was the result of willful conduct. Thus, we conclude that no legal basis existed to exclude that evidence. (*People v. Gonzales, supra,* 22 Cal.App.4th at p. 1758; *People v. Jordan, supra,* 108 Cal.App.4th at p. 358.) To prevent unfair surprise and to give Landroche and his counsel additional time to prepare the defense, the court properly acted within its authority and discretion by granting Landroche's request for a continuance of the trial date. (1054.5, subd. (b); *People v. Ayala*, *supra*, 23 Cal.4th at p. 299; *People v. Lamb, supra,* 136 Cal.App.4th at p. 581.)

In light of our conclusions, we need not, and do not, address Landroche's contention that the court's "failure to exclude the [Evidence Code section] 1109 evidence was not harmless." (See *People v. Gonzales, supra,* 22 Cal.App.4th at p. 1758 ["absent a showing of significant prejudice *and* willful conduct, exclusion of testimony is not appropriate as punishment" (italics added)].)

II. *EVIDENCE CODE SECTIONS 1109 AND 352, AND CALCRIM NO. 852*

Landroche next contends the judgment of guilt should be reversed because (a) the court erroneously admitted evidence to prove Landroche's propensity to commit the charged offense in violation of Evidence Code section 352 and his federal constitutional rights to due process and equal protection, and (b) the court gave CALCRIM No. 852, a propensity instruction, to the jury in violation of his rights to due process and equal protection of the law. We reject these contentions.

A. *Constitutionality of Evidence Code section 1109*

Landroche asserts that, despite the California Supreme Court's decision in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), Evidence Code section 1109 is "facially invalid under the federal due process and equal protection clauses." He complains that Evidence Code section 1109 "reversed several hundred years of common law protection of the rights of the accused" by allowing the use of propensity evidence, and the court's admission of evidence of his assaults against Hefty and Sepke to prove he had a propensity to commit acts of domestic violence violated his right to federal due process of law. He also complains that Evidence Code section 1109 "singles out individuals who commit acts of domestic violence and denies them protection that has been afforded for over 300 years to individuals charged with crimes," and thus the court denied him equal protection of the laws when it admitted evidence of his assaults against Hefty and Sepke over defense objection.

1. *Due process*

Landroche's claim that the admission of propensity evidence under Evidence Code section 1109 violates a criminal defendant's federal constitutional due process rights is unavailing. In *Falsetta*, *supra*, 21 Cal.4th at page 917, our Supreme Court rejected a similar attack on analogous provisions of Evidence Code section 1108, subdivision (a), which permit evidence of prior sex offenses to be admitted when a defendant is charged with a sexual offense. The high court stated:

> "In summary, we think the trial court's discretion to exclude propensity evidence under [Evidence Code] section 352 saves [Evidence Code] section 1108 from defendant's due process

> challenge. As stated in [*People v.*] *Fitch* [(1997) 55 Cal.App.4th 172], '[Evidence Code S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . [Evidence Code] section 352. [Citation.] By subjecting evidence of uncharged sexual misconduct to the weighing process of [Evidence Code] section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. [Citation.] This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . [Evidence Code] section 1108 does not violate the due process clause.' ([*People v.*]*Fitch*, *supra*, 55 Cal.App.4th at p. 183, italics added)." (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.)

Thus, the high court upheld Evidence Code section 1108 against a due process challenge in part because its provisions allow trial courts to exclude evidence that is unduly prejudicial under Evidence Code section 352. (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) It is the discretion given to trial courts to exclude evidence of prior acts under Evidence Code section 352 that satisfies the requirements of due process. (*Ibid*.)

Evidence Code sections 1108 and 1109 are virtually identical, except that the former addresses the admissibility of evidence of prior sexual offenses while the latter addresses evidence of prior acts of domestic violence.[8] Although the California Supreme

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8 Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a *sexual offense*, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Italics added.) By way of comparison, we again note that Evidence Code

Court has not addressed the issue, the intermediate appellate courts have consistently applied the reasoning in *Falsetta* to reject facial federal and state constitutional due process challenges regarding the admission of propensity evidence under Evidence Code section 1109. (See this court's decision in *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704; see also *People v. Williams* (2008) 159 Cal.App.4th 141, 147; *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120; *People v. Price* (2004) 120 Cal.App.4th 224, 240 (*Price*); *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1310 (*Jennings*); *People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026-1027; *People v. Johnson* (2000) 77 Cal.App.4th 410, 417.) We agree with the reasoning and results in these cases and reaffirm our holding in *Cabrera, supra,* 152 Cal.App.4th 695. We also agree with the *Jennings* court's observation that "the constitutionality of [Evidence Code] section 1109 under the due process clauses of the federal and state constitutions has now been settled." (*Jennings, supra,* 81 Cal.App.4th at p. 1310.)

2. *Equal protection*

Landroche's claim that the admission of propensity evidence under Evidence Code section 1109 violates a criminal defendant's federal constitutional equal protection rights is equally unavailing. Although the California Supreme Court has not addressed the

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section 1109, subdivision (a)(1) provides in part: "[I]n a criminal action in which the defendant is accused of an *offense involving domestic violence*, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Italics added.)

issue, the Court of Appeal rejected similar challenges in *Jennings, supra,* 81 Cal.App.4th 1301 and *Price, supra,* 120 Cal.App.4th 224. The *Jennings* court stated:

> "On its face, [Evidence Code] section 1109 treats all defendants charged with domestic violence equally; the only distinction it makes is between such domestic violence defendants and defendants accused of other crimes. Neither the federal nor the state constitution bars a legislature from distinguishing among criminal offenses in establishing rules for the admission of evidence; nor does equal protection require that acts or things which are different in fact be treated in law as though they were the same." (*Jennings, supra,* 81 Cal.App.4th at p. 1311.)

The *Jennings* court concluded that domestic violence defendant are not similarly situated to all other defendants for purposes of equal protection analysis. (*Jennings, supra,* 81 Cal.App.4th at p. 1311.)

Citing *Jennings*, the *Price* court stated that "[t]he evidentiary distinction drawn by section 1109 of the Evidence Code between domestic violence offenses and other offenses is relevant to the evidentiary purpose underlying this distinction." (*Price, supra,* 120 Cal.App.4th at p. 240.)

We agree with the reasoning and results in *Jennings* and *Price*. Accordingly, we adopt their analyses as our own.

B. *Evidence Code Section 352*

Landroche next contends the evidence of his prior acts of domestic violence was not admissible under Evidence Code section 1109 because it was not admissible under Evidence Code section 352. For reasons we shall explain, we conclude the court did not abuse its discretion under Evidence Code section 352 in admitting the evidence of Landroche's prior acts of domestic violence.

1. *Background*

Over defense objection, as already discussed, the court admitted Ashlie Sepke's and Sarah Hefty's testimony regarding Landroche's prior acts of domestic violence against them. The court found that the evidence of Landroche's prior acts of domestic violence was "very, very probative," and that its probative value "far outweigh[ed]" any prejudicial effect.

2. *Applicable legal principles*

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

For purposes of that section, the term "prejudice" applies to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual and has very little effect on the issues. (*People v. Rucker, supra,* 126 Cal.App.4th at p. 1119.) Thus, in applying Evidence Code section 352, "prejudicial" is not synonymous with "damaging." (*People v. Rucker, supra*, at p. 1119; *People v. Bolin* (1998) 18 Cal.4th 297, 320.) "Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s)." (*People v. Rucker, supra,* 126 Cal.App.4th at p. 1119.)

3. *Analysis*

The court properly found that the evidence of Landroche's prior acts of domestic violence against Sepke and Hefty was very probative. The evidence showed that he became violent with each of the women during the time he cohabitated with them, thereby showing his propensity for violence against cohabitants.

Landroche acknowledges that the similarities between the prior acts and his violent conduct toward Abel "increased the probative value of the [Evidence Code section] 1109 evidence." He complains, however, that these similarities contributed to the "prejudicial nature" of the propensity evidence "because it would make the jury inclined to simply assume [he] was behaving in the same manner [in which] he previously behaved rather than assess[] all the evidence, including [Abel's] credibility." However, use of the evidence in this manner is proper, "to assure that the trier of fact would be made aware of the defendant's [commission of other domestic violence] in evaluating the victim's and the defendant's credibility." (*Falsetta*, *supra*, 21 Cal.4th at p. 911.)

Landroche's prior acts of domestic violence were not prejudicially more inflammatory than the conduct for which he was charged in this case. Abel testified that Landroche hit her 10 to 15 times with the leather part of his belt. Sepke's testimony showed that Landroche hit her in the face, mouth and neck with the back of his hand. Hefty's testimony showed that Landroche on different occasions poked her near the eye and pushed her head down under the dashboard of a vehicle, punched her in the mouth, and choked her.

Landroche's prior acts of domestic violence were not prejudicially remote in time. In this case, the jury convicted Landroche of willfully and unlawfully inflicting corporal injury on Abel, a cohabitant, in August 2006, in violation of section 273.5(a). As already discussed, the Evidence Code section 1109 propensity evidence showed that Landroche committed the prior acts of domestic violence against Ashlie Sepke in 2003 and against Sarah Hefty in 2005.

Landroche does not contend the jury may have confused the prior acts of domestic violence with the charged act. The presentation of the propensity evidence also did not involve an undue consumption of time, as the parties stipulated to Sepke's testimony and the transcription of Hefty's testimony consists of only 30 pages of the reporter's transcript.

The propensity evidence did not raise an issue as whether Landroche had been convicted and punished for his prior commission of domestic violence. The evidence showed that during their relationship, Hefty visited Landroche in jail numerous times, and he eventually told her he was in jail for stalking Sepke. Her testimony also showed that she testified at Landroche's probation revocation hearing.

Finally, any risk that the jury might convict Landroche of the offense charged in this case in order to punish him for his prior acts of domestic violence was minimized by the court's limiting instruction under CALCRIM No. 852 (discussed, *post*). In sum, the court did not abuse its discretion under Evidence Code section 352 in admitting the propensity evidence under Evidence Code section 1109.

C. *CALCRIM No. 852*

Landroche contends that the court's instructions to the jury under CALCRIM No. 852 violated his federal constitutional right to due process by allowing the jury to find by only a preponderance of the evidence that he committed uncharged prior acts of domestic violence, and then infer his guilt of the currently charged offense from the commission of the prior acts. This contention is unavailing.

1. *Background*

The court gave the following modified version of CALCRIM No. 852, which instructed the jury regarding its consideration of the propensity evidence of Landroche's prior acts of domestic violence that the prosecution presented under Evidence Code section 1109:

> "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: Acts of domestic violence against Ashlie Sepke and Sarah Hefty. Domestic violence means abuse committed against an adult who is a cohabitant. [¶] Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.
>
> "The term cohabitants means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as husband and wife, (5) the parties' registering as domestic partners, (6) the continuity of the relationship, and (7) the length of the relationship.
>
> "*You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed*

> *the uncharged domestic violence*. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.
>
> "*If the People have not met this burden of proof, you must disregard this evidence entirely. If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Count 1, as charged here*.
>
> "*If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Count 1, as charged here. The People must still prove each element of every charge beyond a reasonable doubt*." (Italics added.)

2. *Analysis*

In *People v. Reyes* (2008) 160 Cal.App.4th 246 (*Reyes*), the Court of Appeal considered and rejected the same contention that Landroche raises here. In *Reyes*, the defendant claimed that CALCRIM No. 852 violated his right to due process because it allowed the jury to find him guilty of the charged offenses (misdemeanor spousal battery and making a criminal threat) based solely upon finding uncharged offenses true by a preponderance of the evidence. (*People v. Reyes, supra,* at p. 250.)

In rejecting that claim, the *Reyes* court explained that the California Supreme Court held in *Falsetta*, *supra*, 21 Cal.4th at page 915, that Evidence Code section 1108 (discussed, *ante*) conforms with the requirements of due process; and that the high court also held in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012, that CALJIC No. 2.50.01,

an instruction explaining the application of [Evidence Code] section 1108, is proper. (*Reyes, supra,* 160 Cal.App.4th at p. 251.)

The *Reyes* court then explained that "[t]he analysis in *Falsetta* has been used to uphold the constitutionality of Evidence Code section 1109 [citations] and the analysis in *Reliford* has been used to uphold the constitutionality of the corresponding CALJIC instruction, CALJIC No. 2.50.02. [Citation.]" (*Reyes, supra,* 160 Cal.App.4th at p. 251.) Noting that the courts have concluded there is no material difference between CALJIC No. 2.50.01 and CALJIC No. 2.50.02, the *Reyes* court held:

> "Similarly, there is no material difference between the language found constitutional in CALJIC No. 2.50.02 and that in CALCRIM No. 852. In fact, CALCRIM No. 852 is expressed in clearer language and makes more certain the manner in which such evidence may or may not be used by the jury. The reasoning of the cases analyzing CALJIC No. 2.50.02 is equally applicable to the validity and propriety of CALCRIM No. 852." (*Reyes, supra,* at pp. 251-252, fns. omitted.)

In rejecting the due process challenge to CALCRIM No. 852, the Court of Appeal reasoned in *Reyes* that this instruction makes clear the evidence of uncharged acts of domestic violence may only be considered if it has been established by a preponderance of the evidence, the instruction explains what is meant by that burden of proof, and the evidence must be disregarded entirely if that burden is not met. (*Reyes, supra,* 160 Cal.App.4th at p. 251.)

The *Reyes* court also reasoned that, like CALJIC No. 2.50.02, CALCRIM No. 852 (1) explains that if the jury finds the defendant committed the uncharged acts of domestic violence, "it may, but is not required to conclude the defendant was disposed or inclined

to commit domestic violence and may also conclude that the defendant was likely to commit and did commit the crimes charged in this case" (*Reyes, supra,* 160 Cal.App.4th at p. 252, italics omitted); and (2) clarifies that even if the jury concludes the defendant committed the uncharged acts, this conclusion is only one factor to consider along with all the other evidence, and it is not sufficient by itself to prove the defendant is guilty of the charged offenses. (*Ibid*.) Noting that CALCRIM No. 852 then goes on to state that the People must still prove each element of every charge beyond a reasonable doubt, the *Reyes* court approvingly stated that CALCRIM No. 852 goes further than CALJIC No. 2.50.02 with a clarification that inures to the defendant's benefit. (*Reyes, supra,* at p. 252.)

We agree with the reasoning and results in *Reyes.* Accordingly, we adopt its analysis as our own.

III. *UNANIMITY INSTRUCTION*

Landroche next contends the judgment of guilt must be reversed because the court violated his right to due process of law and his Sixth Amendment right to a jury trial by failing to give a unanimity instruction. We reject this contention.

A. *Applicable Legal Principles*

A jury verdict must be unanimous in a criminal case. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

In *People v. Muniz* (1989) 213 Cal.App.3d 1508, 1517, this court explained that "[i]t is well established that the entire jury must agree upon the commission of the same act in order to convict a defendant of the charged offense." The requirement of jury

unanimity as to the criminal act is intended to eliminate the danger that the defendant will be convicted even though there is no single offense that all the jurors agree the defendant committed. (*People v. Russo, supra,* 25 Cal.4th at p. 1132.)

In *Muniz* we also explained that "a trial court is not obligated to give an instruction—either requested or sua sponte—if the evidence presented at trial is such as to preclude a reasonable jury from finding the instruction is applicable. [Citation.] 'A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' [Citation.] In other words, '[i]f under the evidence presented such disagreement is not reasonably possible, the instruction is unnecessary.' [Citations.]" (*People v. Muniz*, *supra*, 213 Cal.App.3d at pp. 1517-1518.)

"Neither instruction nor election are required, however, if the case falls within the continuous course of conduct exception. This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time." (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224; accord, *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.)

B. *Analysis*

Landroche maintains the court erred in failing to give a unanimity instruction because the testimony of victim in this case, Abel, showed that Landroche struck her two

separate times on August 25, 2006: when he smacked her on the head 20 to 30 times as they were driving home together and later when he hit her with his belt in the apartment.

The fact that Abel's testimony shows Landroche struck her on two separate occasions, however, does not establish that the court was required to give the jury a unanimity instruction. In the amended information, the People charged Landroche with one count (count 1) of willfully and unlawfully inflicting corporal injury on a cohabitant in violation of section 273.5(a), which provides in part: "Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, *corporal injury resulting in a traumatic condition*, is guilty of a felony." (Italics added.) Specifically, the People alleged that "[o]n or about August 25, 2006, [Landroche] did willfully and unlawfully inflict a *corporal injury resulting in a traumatic condition* upon [Abel], who was then and there a person with whom [he] is cohabiting, in violation of [section 273.5(a)]." (Italics added.) This charging allegation did not specify whether the alleged criminal act was Landroche's smacking Abel in the head inside the car, or his striking her with his belt.

However, count 1 also contained a sentencing enhancement allegation that *did* identify the specific act that violated section 273.5(a). That allegation stated: "[I]t is further alleged that in the commission and attempted commission of the above offense, [Landroche] personally used a deadly weapon, to wit: a *belt*, within the meaning of [section 1192.7, subdivision (c)(23)]." (Italics added.) Thus, the allegations in the amended information clearly indicated the People were alleging that Landroche violated

sections 273.5(a) and 1192.7, subdivision (c)(23) by striking Abel with his belt in the apartment, not by smacking her on the head in the car.

A review of the transcript of the prosecutor's closing argument at trial confirms that he made an election and chose the alleged act of striking Abel with the belt as the factual basis for count 1. Although he began by telling the jury that Landroche had assaulted Abel "on two separate occasions" on August 25, 2006, he then repeatedly argued that Landroche committed one assault that resulted in a traumatic condition in violation of section 273.5(a): The assault with the belt inside the apartment. Specifically, referring to a photograph of a mark on Abel's body left by the belt, the prosecutor told the jury:

> "[Y]ou can see what that mark looks like. You can see it for yourself, and you don't need an expert to tell you what that looks like. . . . And that what [Landroche] did to [Abel] on August 25th, 2006. I'm asking you to find [Landroche] guilty of corporal injury to a cohabitant and that he used a dangerous or deadly weapon."

Soon thereafter, the prosecutor asked the jury to "find [Landroche] guilty because he . . . battered and he assaulted [Abel], causing a traumatic condition." Reading the definition of the term "traumatic condition" set forth in CALCRIM No. 840,[9] the prosecutor told the jury:

> "A traumatic condition is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force."

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9 That definition is based on section 273.5, subdivision (c), which provides: "As used in this section, 'traumatic condition' means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force."

The prosecutor then argued that the "traumatic condition" in this case consisted of the mark and bruises on Abel's body that Landroche caused by hitting her with the belt:

> "[*T*]*he traumatic condition, folks, are the mark*s[,] *the belt mark and the bruises that were on her body*. And that's the definition of a traumatic condition[:] "A wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.' [*Landroche*] *hit* [*Abel*] *with a belt*. She was trying to keep him from hitting her, so she was moving around, but *it left marks*. And mark No. 5 on her thigh, as you see it, what's that look like to you, folks? What do you think it is? *The traumatic condition has been proven beyond a reasonable doubt*." (Italics added.)

In arguing that the belt Landroche used was a deadly or dangerous weapon, the prosecutor again indicated he had made an election, and the factual basis for count 1 was Landroche's use of the belt to strike Abel in the apartment:

> "I'd like you to discuss the facts of this case in deciding this issue. [Abel] is on the floor, on the ground with [Landroche]. And *he's got a belt* that he described to Detective Henderson . . . . [I]t was 38 inches long, and he bent it over; had the buckle part in his hands and the end of the strap, and he's hitting her. . . . [I]f he hits her in the face with a belt—*hitting an adult with a belt like that* while you're angry, isn't that likely to cause great bodily harm? . . . I submit to you that's why this is a deadly or dangerous weapon. . . ." (Italics added.)

Defense counsel Mohun's closing argument also indicates that the factual basis for count 1 was Landroche's use of the belt to strike Abel. Mohun argued that a belt is not a deadly or dangerous weapon because, unlike a knife or gun, it is not inherently dangerous. He challenged Abel's credibility by arguing that the prosecution failed to produce the belt:

> "Where is this? Shouldn't the prosecutor show you, this is the belt that hit her. Whack. She says she has it. Detective Henderson says that he impounded it and was going to to give it an impound number.

> Where is that belt? She tells Kristine Rhodes, apparently, that she has it. She tells Detective Henderson that she has it. But at the end of the day, when it comes times to show, nothing goes. She doesn't have it."

Based on the foregoing record, no reasonable jury, or attorney for that matter, could believe that count 1 was based on any act other than Landroche's alleged use of the belt to strike Abel inside the apartment. We conclude the court did not err by failing to give a unanimity instruction.

IV. *PITCHESS MOTION*

Landroche also contends this court should independently review the court's in-camera ruling on his *Pitchess* motion and determine whether the judgment should be reversed.

A. *Background*

Detective Henderson interviewed Abel. He also assisted in arresting Landroche.

Landroche filed a *Pitchess* motion,[10] seeking any materials in the personnel records of the San Diego Police Department that would bear on Detective Henderson's credibility. Landroche alleged in his motion that Detective Henderson falsified his reports and had lied about certain key facts in the case, such as whether Detective Henderson read Landroche his *Miranda*[11] rights before Landroche was interrogated,

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10 By order dated May 19, 2008, this court granted Landroche's unopposed motion to augment the record on appeal to include copies of the *Pitchess* motion he filed in the trial court on November 27, 2006, and the People's opposition to that motion.

11 *Miranda v. Arizona* (1966) 384 U.S. 436.

whether Landroche admitted that he struck Abel with a belt, and whether Detective Henderson impounded a belt as evidence.

On December 22, 2006, the trial court[12] conducted an in camera inspection of Detective Henderson's personnel records to determine whether they contained any complaints or discipline involving allegations of dishonesty or misconduct amounting to moral turpitude by the officer in the past. The court obtained the sworn testimony of the custodian of the records, made a record of the personnel records it reviewed, indicated it reviewed the records that dated back seven years, and stated it had not found anything that was "remotely discoverable within the applicable law."

The trial court then informed defense counsel in open court that it had spent about 25 minutes reviewing the personnel records for the last seven years, and had not found any materials of the type referenced in the discovery request. Specifically, the court stated to Landroche's counsel, "I found absolutely nothing that I think is by any reasonable understanding of the scope of discovery, anything that . . . I thought [was] even remotely discoverable."

B. *Analysis*

Landroche asked this court to independently review the sealed materials and determine whether there is any discoverable information in those materials. The Attorney General agrees we should independently examine the files. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1231.)

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12 The Honorable David M. Gill.

We ordered the sealed materials produced for our independent review. Having received and reviewed the officer's personnel records we agree with the trial court that nothing in such files should be disclosed in response to the *Pitchess* motion filed by Landroche. Accordingly we find no error in the trial court's review of the records.

V. *PRISON PRIOR ENHANCEMENT*

Last, Landroche contends the one-year sentence for the prison prior enhancement should be stricken because the court had no authority to stay the mandatory enhancement. For reasons we shall explain, we conclude this issue is moot.

In sentencing Landroche, the court initially stated it would stay the one-year prison prior enhancement:

> "I'm going to pick the midterm. Commit him to the State Department of Corrections for double the midterm, which is six years. I'm not going to add, *I'll stay the one year prison prior*. I'm not going to give him seven years."

However, later during the October 16, 2007 sentencing hearing, the court ordered the one-year prison prior enhancement stricken, stating, "I strike this prison prior . . . ." The court's minutes state, "Court strikes prison prior." The abstract of judgment does not list the enhancement. In his appellant's reply brief, Landroche does not address the People's contention in their respondent's brief that this issue is moot, and the sentence was proper.

We conclude that Landroche's claim that "the sentence for the prison prior enhancement should be stricken" is moot, as the record shows the court ordered that

enhancement stricken and no such enhancement appears on the abstract of judgment. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.